

STATE OF MICHIGAN
COURT OF APPEALS

DIANE GRAHAM,

Plaintiff-Appellant,

v

RITE AID CORP.,

Defendant-Appellee.

UNPUBLISHED

May 13, 2003

No. 240500

Wayne Circuit Court

LC No. 01-141491-NI

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm.

I. Factual and Procedural History

On December 7, 1998, plaintiff went to a store owned by defendant, Rite Aid Corp., to fill a prescription. Plaintiff was given the wrong medication. She took this medication for four or five days before the error was discovered. Plaintiff developed a rash covering her whole body, a body temperature of 103 degrees, and a loss of hearing. She also suffered from hallucinations and crying spells.

On December 6, 2001, plaintiff filed a complaint, alleging that defendant was negligent for: (1) failing to fill plaintiff's prescription and dispensing the wrong medication to plaintiff, (2) hiring employees that it knew were incapable of performing their pharmaceutical duties, and (3) failing to properly train and supervise its employees to ensure that improperly filled prescriptions were not given to patients. Defendant filed a motion for summary disposition, arguing that plaintiff's complaint must be dismissed because it was prematurely filed and did not comply with the requirement of MCL 600.2912b¹ that a plaintiff alleging medical malpractice must provide the health facility with a written notice of intent to sue at least 182 days before the action is

¹ "[A] person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." MCL 600.2912b(1).

commenced, and plaintiff failed to comply with the requirement of MCL 600.2912d² that a plaintiff alleging medical malpractice must file an affidavit of meritorious claim signed by a health care professional. The trial court granted defendant's motion for summary disposition, concluding that plaintiff's complaint sounded in malpractice and was in violation of MCL 600.2912b and MCL 600.2912d.

II. Analysis

Plaintiff does not dispute that she did not provide to defendant a pre-suit notice of intent to sue or an affidavit of merit with her complaint. However, plaintiff argues that MCL 600.2912b and MCL 600.2912d do not apply to her because her claim arises out of ordinary negligence rather than medical malpractice. Therefore, plaintiff argues, the trial court erred by requiring plaintiff to satisfy the requirements of MCL 600.2912b and MCL 600.2912d.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court also reviews de novo questions of statutory interpretation. *Michigan Muni Liability and Prop Pool v Muskegon Co Bd of Co Rd Comm'rs*, 235 Mich App 183, 189; 597 NW2d 187 (1999).

The core issue in this case is whether plaintiff's complaint alleges medical malpractice, requiring a notice of intent to sue under MCL 600.2912b and an affidavit of merit under MCL 600.2912d, or ordinary negligence, which does not require a notice of intent to sue or an affidavit of merit.

The key to a medical malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship. The providing of professional medical care and treatment by a hospital includes supervision of staff physicians and decisions regarding selection and retention of medical staff. [*Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45; 594 NW2d 455 (1999), quoting *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 652-653; 438 NW2d 276.]

The Supreme Court in *Dorris, supra* at 46, went on to hold:

The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment.

In the present case, plaintiff does not dispute that defendant, as a pharmacy, is considered a health care provider for the purposes of Michigan's malpractice statutes. *Simmons v Apex Drug Stores, Inc*, 201 Mich App 253; 506 NW2d 562 (1993), mod by *Patterson v Kleiman*, 447

² "[T]he plaintiff in an action alleging medical malpractice . . . shall file with the complaint an affidavit of merit signed by a health professional" MCL 600.2912d.

Mich 429, 433-435 (1994). In both *Simmons, supra*, and *Becker v Meyer Rexall Drug Co*, 141 Mich App 481; 367 NW2d 424 (1985), this Court determined that a complaint alleging injury caused by a pharmacist's negligent dispensing of the wrong medication was governed by the malpractice statutory requirements as opposed to the ordinary negligence requirements. In the present case, as in *Simmons* and *Becker*, defendant, as a pharmacy, failed to dispense the prescribed medication, but gave plaintiff the wrong medication. We conclude, as we concluded in *Simmons* and *Becker*, that defendant's negligence in dispensing the wrong medication occurred within the course of its professional relationship with plaintiff. Because the issues in this case involve dispensing prescriptions, they raise questions involving medical judgment and are therefore medical malpractice claims. *Dorris, supra* at 46.

The fact that plaintiff alleged negligent hiring, training, and supervision does not change the malpractice nature of her claim. "The gravamen of an action is determined by reading the claim as a whole." *Simmons, supra* at 253. In *Dorris, supra* at 47, our Supreme Court held that allegations concerning staffing decisions and patient monitoring in a psychiatric ward involved questions of professional medical management and not issues of ordinary negligence that could be judged by the common knowledge and experience of the jury. The Court explained that "[t]he ordinary layman does not know the type of supervision or monitoring that is required for psychiatric patients in a psychiatric ward." *Id.* at 47. This reasoning applies similarly in the present case because the ordinary layman does not know the type of training, supervision, or experience that is required to dispense prescribed medications. " 'A complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence.' " *Dorris, supra* at 43, quoting *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (ED Mich, 1997). Therefore, plaintiff's allegations of negligent hiring, training, and supervision do not excuse her from the procedural requirements for medical malpractice claims.

Because plaintiff alleges claims of medical malpractice, she was required to provide a notice of intent to sue under MCL 600.2912b and an affidavit of merit under MCL 600.2912d. When the limitations period has not yet expired, the appropriate sanction for failure to comply with these procedural requirements would be dismissal without prejudice. *Dorris, supra* at 47; *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). However, when a plaintiff fails to provide notice of intent to sue or fails to file an affidavit of merit and the limitations period has expired, the complaint should be dismissed with prejudice. *Id.* at 706-707. Because plaintiff's claims are for medical malpractice, the two-year statute of limitations applies.³ Therefore, plaintiff's malpractice complaint is time-barred because it was not filed within two years of the alleged malpractice. Accordingly, plaintiff's complaint should have been dismissed with prejudice under MCR 2.116(C)(7).⁴ *Holmes, supra* at 706-707. The fact that the trial court apparently granted summary disposition under a subrule other than (C)(7) makes no difference. "This Court ordinarily affirms a trial court's decision if it reached the right

³ "[T]he period of limitations is 2 years for an action charging malpractice." MCL 600.5805(5).

⁴ Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is barred due to application of the statute of limitations.

result, even for the wrong reasons.” *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000). See also MCR 2.116(I)(1).⁵

Affirmed.

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra

I concur in the result only.

/s/ E. Thomas Fitzgerald

⁵ “If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.” MCR 2.116(I)(1).